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INJUNCTIONS IN LABOR DISPUTES.

The recent decision of a New York court whereby an association of employers known as the Cloak, Suit and Skirt Manufacturers Association was enjoined from putting into effect the piece work system contrary to the terms of a contract theretofore made with their employees, marks another milestone in the legal history of the ever recurrent struggle between capital and labor. Thus we find the striking employee joining the ranks of employers, working employees, and the public, the three other parties concerned, all of whom have had recourse to this equitable weapon. The employer has so often made use of this weapon in disputes with striking employees that a fairly well defined legal scope has been established governing its issuance and the extent of its operation. Even the non-striking employee has had recourse to this "flexible remedial power of a court of equity" as Chief Justice Taft so aptly terms it in a recent decision. This rather novel use of the injunction in labor disputes occurred in North Carolina, where the Superior Court of Raleigh granted an injunction against picketing and intimidation by strikers at the instance, not of the employer, but of persons desiring to work, who alleged that they were threatened and harassed in their efforts to do so.

Still another party to these disputes between capital and labor has found protection in the injunctive power of a court of equity, and this is no less than the United States Government. In the Debs case which arose out of the American Railway Union strike of 1894 Uncle Sam called on the courts to enjoin the strikers from interfering with the mails or goods shipped in interstate commerce, which call was duly heeded. In a measure the party seeking protection in that instance was the public, the party who during such troubles and thereafter really bears the burden and pays the costs.

Supine though the great American public may have been in the past and to some extent still is, yet it is slowly awakening and making its power felt, so that now a strike or a lockout that fails to secure a favorable judgment at the bar of public opinion is almost doomed to failure. Not content, however, with the somewhat tardy results attendant on the manifestation of public opinion, the public in at least one instance has taken a hand in labor disputes far exceeding the comparatively mild action taken in the Debs case. In one state of the Union, Kansas, the public has created for

itself a special court known as the Court of Industrial Relations, which it has endowed with all kinds of powers over the employer and the employee to the end that the public may not suffer when these two-fall out. The industries affected by the act creating the court, and they include practically all which touch the daily lives of the people, from public utilities to the manufacture and distribution of fuel, food and clothing, are declared to be affected with a public interest and therefore subject to the supervision of the state for the purpose of preserving the public peace, protecting the public health, and preventing industrial strife, disorder and waste, and securing the orderly conduct of the businesses directly affecting the living conditions of the people of the state and the promotion of the public welfare. It is further declared that such businesses shall be operated with reasonable continuity and efficiency in order that the people of the state may live in peace and security, and be supplied with the necessaries of life. To this end all persons, including employers and employees, are forbidden to hinder or delay the continuous operation of the businesses affected. The Industrial Court is given the power to fix both the wage of the employee and the return on capital invested, which the act creating it declares shall be fair and reasonable in both cases. While acknowledging the right on the part of employees to strike, the act forbids any conspiracy on the part of employees to quit their employment for the purpose of burdening, hindering, delaying or suspending the operation of any of the industries concerned, and specifically forbids any person to engage in what is known as "picketing," or to intimidate by threats, abuse, or in any other manner, any person with the intent to induce him to quit his employment or deter him from accepting employment. Here the public has asserted its right with a vengeance, compared to which the injunctions granted by the courts are as a halting request. That the Kansas method of dealing with capital and labor, employer and employee, however much it may savor of state socialism, and run counter to our ideas of personal rights and liberties, is finding favor among other states is evidenced by the fact that bills have been introduced in the legislatures of several states looking to similar regulations.

The fourth and last interest to avail itself of the injunctive weapon in labor disputes is that of the striking employees them-

selves, thus completing the circle, all parties being present. In the past the voice of labor has been the loudest and most persistent in its condemnation of the injunction as a means of coercion in labor disputes, and the phrase "government by injunction" has been bandied about by labor leaders and politicians seeking the labor vote as the iniquity of iniquities.

The decision in the Garment Workers' case has created an unusual amount of comment among the press of the country, not so much because of any novelty in the principles announced or of a new precedent set, as because of the fact that it is the first instance where labor has sought the aid of the courts to restrain a combination of employers from violating alleged rights. It has taken a leaf out of the enemy's book, captured his guns and trained them on him. Under the heading "Labor Discovers the Law" the New York *Herald* says editorially:

The legal remedy or wrongs in the world of labor has always been ready for the injured to take; but, as Justice Wagner says, "heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable acts of the employee." That was not the fault of the law, which does not know the employer from the employed. It was the fault of a distrust sowed for many years in the minds of organized labor by its own false friends. The present case, in which Justice Wagner holds that the Cloak, Suit and Skirt Manufacturers Association broke its contract with the International Ladies' Garment Workers Union, should open the eyes of the rank and file in organized labor to the fact that the laws are for them as well as for their employers. For years they have heard the courts maligned by labor agitators, who shouted that courts were places from which "government by injunction" issued. Now the workers find themselves in possession of one of those dreadful injunctions. It enjoins their employers from further abrogating the broken contract. It opens the way for an employees' suit to recover damages. It shows the men and women of organized labor that they may find in the courts the justice which never can be obtained through violence and disorder. As might have been expected, some of the labor agitators do not like the emphasis which Justice Wagner's decision has put upon the fact that "equity is open to employer and employee alike." Even

Morris Hillquit, who is one of the counsel for the winning union, declines to be converted to the opinion that court injunctions are the proper method of adjusting industrial disputes, and is reported as saying: "Organized labor will not become reconciled to the use of injunctions in labor disputes because it may occasionally serve their own ends. Injunctions against employers can never be as drastic and deadly as those issued against workers. When an employers' association is restrained from holding meetings in furtherance of a conspiracy to induce a breach of agreements with workers the members of the association, comparatively small in number, can find hundreds of ways of circumventing the prohibition. But when large masses of strikers are enjoined from meeting and orderly picketing it is a death thrust to their struggle. One of the principal merits of the precedent established in the present suit is that it will tend to make injunctions less popular with employers. I hope it will lead to a radical limitation and eventually the complete abolition of judicial interference in labor disputes by means of the injunction."

This view will hardly coincide with that of those not so wedded to the rights of a class.

The court also recognized the novelty of the situation and called attention to it in its opinion, saying:

While this application is novel it is novel only in respect that for the first time an employees' organization is seeking to restrain their employers' organization from violating a contractual obligation. It is elementary and sometimes requires emphasis that the door of a court of equity is open to employer and employee alike. It is no respecter of persons, it is keen to protect the legal rights of all. Heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable illegal acts of the employee. But mutuality of obligation compels a mutuality of remedy. The fact that the employees have entered Equity's threshold by a hitherto untraveled path does not lessen their rights to the law's decree. Precedent is not our only guide in deciding these disputes, for many are worn out by time and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, cannot be ignored by

the courts. Our decisions should be in harmony with that modern conception and not in defiance of it.

The point at issue in the Garment Workers' case was the violation by the employers of a contract theretofore made with the union which provided for a week's work of so many hours, by substituting what is known as the piece-work system. After reviewing the history of the negotiations between the employees and employers, resulting in the contract to discontinue the piece-work system and establishing the week's work system, which contract was still in force, and by its terms was to continue for another six months, the court said:

Being persuaded by the proof adduced that the contract with its modifications was in force on October 25, 1921, the resolution adopted by the defendant association on said date contemplated a material breach of said contract. Further, such contemplated breach was carried out, for on the appointed day (November 14, 1921), the members of the association reestablished the piecework system in their factories. Since the members of defendant association were by the by-laws bound to and did carry out the directions of the association to repudiate its legal obligations, the act constituted a conspiracy. Is, under the circumstances, a court of equity helpless to give succor to plaintiffs? I think not. It cannot be seriously contended that the plaintiffs have an adequate remedy at law. That the damages resulting from the alleged violation of the agreement would be irremediable at law is too patent for discussion. There are over 50,000 workers whose rights are involved and over 300 defendant organizations. The contract expires within six months, and a trial of the issues can hardly be had within that time. It is unthinkable that the court should force litigants into a court of law. A court of equity looks to the substance and essence of things, and disregards matters of form and technical niceties.

A mandatory injunction was granted restraining the association of employers from carrying out the change in the method of work and further commanding them to abrogate the resolution putting the piece-work system into effect. While this order purports to restrain the employers from conspiring in any way to breach the contract theretofore existing with their employees, it recognizes that the contract has already been broken and orders its re-establishment. In effect it is nothing more or less than ordering an em-

ployer to re-employ a striking employee under the terms and conditions of a contract which the employer had broken.

Aside from the interest this decision has created because of the novelty involved in the act of labor enjoining capital, it is of much interest to lawyers because of the legal principles involved. We have become so accustomed to the injunction as a restraint on the excesses of striking employees, when invoked for such purposes, that at first blush one is apt to say, "Why not? What is sauce for the goose is sauce for the gander." And this would unquestionably be true if the acts of the employers sought to be restrained were the same or of the same nature as those at which the injunction against the employee has heretofore been aimed. But are these acts the same? In the case under discussion the employers had broken a contract, in fact they had conspired to break it, but the breach was an accomplished fact, the purposes of the conspiracy had been put into effect, and the injunctive relief was not sought to prevent a breach of contract but to compel the performance of a contract already breached. To the legal mind such a proposition at once brings up the limitations on the power of a court of equity to compel the specific performance of a contract, one of which limitations denies this power where the contract involves personal services. If the decision of Judge Wagner is sound, if a court may by mandatory injunction compel an employer to reinstate striking employees under the conditions as to wages and work prescribed by a contract formerly existing between them, if as Judge Wagner very properly declares, the door of equity is open alike to employer and employee, why cannot the court order the employee to go back to work when he has broken his contract? Can a court of equity compel a man to employ anyone against his will? If so, cannot it also compel a man to work for another against his will? The obvious answer to both of these questions is no. For instance, at the time the garment workers' strike was in progress there was also in effect a strike conducted by the members of the milk drivers' union of New York, declared for the purpose of forcing the employers to grant an increase in wages. According to the press reports the men were working under a contract which they had voluntarily made with their employers, which provided a certain wage, and which still had some time to run. Without any justification

other than the desire for more money, the men on the refusal of the employers to grant the increase, deliberately broke their contract and quit work. The parallel is perfect. The garment employers, according to the press, did exactly the same thing. Now who for a moment would concede that a court could, under the guise of restraining the employees from conspiring to break a contract already broken, compel these drivers to return to work under the old contractual conditions? Certainly no lawyer. Yet this is what the court has done in the garment workers' case—compelled the employer to reinstate his striking employees under the working conditions prescribed by the broken contract. So we see that it is not exactly a case of sauce for the goose and sauce for the gander. The right of a man to work and to determine for whom and for what wages he will work is purely personal, and subject alone to his own control. So the right of an employer of labor to determine whom he will employ and what he will pay him for his services is likewise unquestioned. That the two may agree as to the terms and conditions under which the work shall be performed is only saying that they may exercise the right common to us all, the right of contract. Should this contract be broken by either party, the law provides a remedy, likewise common to both parties, but that remedy does not consist in specific performance of the contract.

That the right of a man to work for whom and under what terms he pleases may be exercised singly or through association with other workers whereby he can sell his skill and energy to better advantage is equally well settled as is the right of employers to combine for their mutual welfare. Theoretically these rights are absolute but like all other personal rights they are subject to the limitations and prescriptions which accompany membership in society and which is well expressed by the maxim *"Sic utere tuo ut non alienum laedas,"* that is to say, so use your own rights as not to infringe on those of others. It is in the effort to prevent the encroachment forbidden by this maxim that recourse is had to the courts and their equitable power to restrain an individual or a group of individuals from an alleged infringement on the rights of others in his or their attempt to enforce the right to work or give work. But to say that either the employer can compel the laborer to work or that the laborer can compel the

employer to furnish work is to go farther than the courts have yet attempted, though the decision of the New York court under discussion approaches perilously near to such a command, if it does not actually reach it.

That labor may be enjoined from the exercise of certain methods to enforce their right to work under fixed terms and conditions is well settled. The law reports abound with cases wherein labor unions and individual members of such unions have been forbidden to indulge in certain practices in their effort to compel the employer to give them work on terms alleged to be necessary for their welfare. Of particular interest in this connection is a recent case decided by the Supreme Court of the United States, *American Steel Foundries* v. *Tri-City Central Trades Council,* 256 U. S.—. This case involved a construction of section 20 of the Clayton Act whereby courts of equity are forbidden to grant an injunction, first against recommending, advising, or persuading others by peaceful means to cease employment and labor; second, against attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from work; third, against peacefully assembling in a lawful manner for lawful purposes. This act the court declares to be merely declaratory of what was the best practice always, and then takes up the question as to how far a court may go in restraining striking employees from interfering with others seeking or engaged in employment. Chief Justice Taft in an elaborate opinion lays down the rule governing such cases as follows: "A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. But while this is so, we must have every regard to the congressional intention manifested in the act, and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to com-

municate with them, and to persuade them to join the ranks of his opponents in a lawful economical struggle. Regarding as primary the rights of the employees to work for whom they will, and, undisturbed by annoying importunity, or intimidation of numbers, to go freely to and from their place of labor, and keeping in mind the right of the employer, incident to his property and business, to free access of such employees, what can be done to reconcile the conflicting interests? Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity, which may try one mode of restraint, and, if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle, should be limited to one representative for each point of ingress and egress in the plant or place of business, and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant; that such representatives should have the right of observation, communication, and persuasion, but with special admonition that their communication, arguments, and appeals shall not be abusive, libelous, or threatening, and that they shall not approach individuals together, but singly, and shall not, in their single efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence, and which may be varied in other cases. It becomes a question for the judgment of the chancellor, who has heard the witnesses, familiarized himself with the locus in quo, and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."

It will be noticed that the chief justice speaks of the rights of the employees to work for whom they will as primary, and if the law is applicable alike to employer and employee as properly asserted by the court in the Garment Workers' case then the right of the employer to hire whom he will and on what terms he will is equally unassailable. As was said in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229: "That the plaintiff was acting within its lawful rights in employing its men only

upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'non-union,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitled other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

That an injunction may be granted to restrain others from persuading a party to a contract to breach it is well settled; and that equity may even restrain a party to a contract from breaching it has been held in some instances. Furthermore there are certain contracts which equity will compel a party to perform after an attempted breach thereof, but there is no case on record where equity has attempted to compel the performance of a contract calling for personal services, and, if the decision in the garment workers' case does not amount to that, as said before, it is so periously near it as to arouse grave doubts as to its soundness and its ability to stand the test of appellate scrutiny. Aside from the legal aspect of the case, however, it would seem a pity for the employee to lose, as in this instance, according to the press, the employees had won a verdict before the bar of public opinion, and are entitled to redress of some nature. On the other hand, the milk drivers' strike, mentioned before, was condemned by public opinion, and the news reports tell us that the strikers are now seeking their old positions under the old terms and are

condemning the leaders who led them into an unjustified strike.

While the only logical conclusion seems to be that a court of equity can neither compel the employee to work nor the employer to hire against his will, there is a higher power that might do so. Since personal rights have been swamped by the advancing wave of police power it is probable that a state could pass a law investing the courts with such power, and in fact it has already been done in one instance, as witness the Kansas situation, supra. If these labor troubles had occurred in Kansas we suppose the court would have made short work of it and sent the employing garment maker to jail along with the striking milkdriver, but occurring as they did in New York we must look to the established doctrines governing injunctive jurisdiction, and to say the least, Justice Wagner's order when considered in that light is questionable.

MINOR BRONAUGH in *Law Notes.*